No. 84-970

Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1984

SANFORD J. BERGER
Petitioner,

vs.

HON. LEO M. SPELLACY, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

SANFORD J. BERGER (PRO SE),
Counsel of Record
ROBERT M. FERTEL
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115
(216) 781-5950
Attorneys for Petitioner

Of Counsel:
BERGER AND FERTEL
1836 Euclid Avenue
Cleveland, Ohio 44115

BROTHERS PRINTING CO., 2000 EUCLID AVE., CLEVELAND, OHIO—(216) 621-6050

QUESTIONS PRESENTED

1. Can a federal Circuit Court of Appeals legitimately avoid a squarely presented and precedented constitutional issue without stated reasons when its case law mandates that the issue first be presented to the state appellate courts and the federal district court (which was done and the issue ignored) before they will entertain and address it?

2. When state and local court rules as interpreted by state appellate case law create a constitutionally protected property right in having a legally assigned and duly elected judge assigned to each new or remanded case, can the administrative judge of a multi-judge state court arbitrarily deprive a litigant of that property interest without affording him due process procedures of notice, a hearing and a statement of reasons therefor?

3. In the suffrage state of Ohio where there is a constitutional mandate that judges be elected, can the Chief Justice of the Supreme Court by his unilateral actions establish an appointed judiciary that serves at his pleasure ad infinitum without violating the Equal Protection Clause?

PARTIES

The plaintiff-appellant in the proceeding in the Court of Appeals was Sanford J. Berger. The defendants-appellees in the Court of Appeals were Leo Spellacy, Administrative Judge of the Court of Common Pleas, General Division, Cuyahoga County, Ohio, and George McMonagle, a retired judge appointed to sit in that court by the Chief Justice of the Supreme Court of Ohio.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings Below ii

Table of Authorities v

Opinions Below 1

Jurisdictional Statement 2

Constitutional & Statutory Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 6

I. Petitioner Had a Property Interest Protected by the Due Process Clause In Having his Case Heard by an Elected Judge Selected by Public Lot of the Clerk of Courts Unless Good Cause Is Shown For The Need Of Transfer to Another Judge. 6

II. Petitioner Is Entitled To An Opportunity Prior To The Transfer Of His Case To Contest The Reasons For Such Transfer. 8

III. The Sixth Circuit Court Of Appeals Failed To Rule Upon Petitioner's Due Process Claims and The Failure To Do So Constituted a Denial Of His Due Process Rights and a Departure From The Accepted and Usual Course Of Judicial Proceedings, So

As to Justify The Exercise Of This Court's Supervisory Powers Pursuant To Rule 17.1(a) Of This Court. 12

IV. Amended §6(C), Article IV of the Ohio Constitution Permits the Chief Justice of the Ohio Supreme Court to Set Up An Appointed Judiciary of Private Citizens Who Serve At His Pleasure In Violation of the Federal Equal Protection Clause. 16

Conclusion 22

Appendix:

Decision of the United States Court of Appeals for the Sixth Circuit (September 24, 1984) A1

Memorandum of Opinion and Order of the United States District Court (January 20, 1984) A4

Order of The Supreme Court of Ohio A9

Journal Entry and Opinion of the Court of Appeals for Cuyahoga County, Ohio (July 1, 1982) A18

U.S. Constitution, Amendment 14 A30

Ohio Constitution, Art.IV, §6 A30

Ohio Revised Code Sec. 141.16 A31

Court of Common Pleas, Cuyahoga County, Ohio, Local Rule 15 A32

Manual of Common Pleas, §1, Rule 8 A33

Published List of Retired Judges A34

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U.S. 186 (1962) 19

Berger v. Berger, 3 Ohio App.3d 125 (1982) 6,9

Blackledge v. Perry, 417 U.S. 21 (1974) 9,10

Brinkerhoff-Faris T&S Co. v. Hill, 281 U.S. 676 (1930) 13

Cherrington v. Hutsinpiller, 112 Ohio St. 468 (1925) 18

Flynt v. Leis, 574 F.2d 874 (C.A.6, 1978) vacated on other grounds in 439 U.S. 438 (1979) 5,11,12

Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 8

Hadley v. Junior College District, 397 U.S. 50 (1970) 19

Hilton v. Bell, 108 Ohio St. 233 (1923) 17,18

Hortonville District v. Hortonville Education Ass'n, 426 U.S. 482 (1976) 18

J.P. v. DeSanti, 653 F.2d 1080 (C.A.6, 1981) 12

James v. Strange, 407 U.S. 128 (1972) 18

Logan v. Zimmerman Brush Co. et al., 455 U.S. 422 (1982) 6,7,10,18

Meachum v. Fano, 427 U.S. 215 (1976) 8

Mennonite Board of Missions v. Adams, ___U.S.___, 103 S.Ct. 2076 (1983) 9

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 9

North Carolina v. Pearce,
395 U.S. 711 (1968) 9

Parker v. Turner,
626 F.2d 1 (C.A.6, 1980) 12

Philadelphia Newspapers, Inc. v. Jerome,
434 U.S. 241 (1978) 14

Pyler v. Doe, 457 U.S. 202 (1982) 18

Reynolds v. Sims, 377 U.S. 533 (1964) 19

Santosky v. Kramer, Com'r,
455 U.S. 745 (1982) 7

Stanley v. Illinois, 405 U.S. 645 (1972) 20

State, ex rel Winn v. Galvin,
39 Ohio St.2d 58 (1974) 17

Street v. New York, 394 U.S. 576 (1969) 15

United States v. August and Bozoff,
unreported, (E.D.,Mich., S.D. 1983) 20

Vitek v. Jones, 445 U.S. 380 (1980) 7

Williams v. Rhodes, 393 U.S. 23 (1968) 19

Wolff v. McDonnell,
418 U.S. 539 (1974) 8

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment XIV, §1 2

Ohio Constitution, Article IV, §6 2,16

STATUTES AND RULES

Ohio Rev. Code Sec. 141.16 17

Ohio Rev. Code Sec. 2921.44 20

Ohio Rev. Code Sec. 2921.45 20

Ohio Supreme Court,
Rules of Superintendence, Rule 3 2,7

Ohio Supreme Court,
Rules of Superintendence, Rule 4 2,6,9

Ohio Supreme Court,
Rules of Superintendence, Rule 9 2

Cuyahoga County Court of Common Pleas,
Rule 15 2,6

Manual For Operation of the Cuyahoga
County Court of Common Pleas,
Section 1, Rule 8 6

United States Supreme Court Rules,
Rule 17.1(a) 13

No.

Supreme Court of the United States

October Term, 1984

SANFORD J. BERGER

Petitioner,

vs.

HON. LEO M. SPELLACY, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Sanford J. Berger petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment entered by that court against him.

OPINIONS BELOW

On January 19, 1984, U.S. District Judge Thomas D. Lambros issued an opinion and order dismissing the Petitioner's claims with prejudice. (Appendix, infra, A4-A8).

On September 24, 1984, the United States Court of Appeals for the Sixth Circuit issued its decision affirming the opinion and order

of the United States District Court. (Appendix, infra, A1-A3).

JURISDICTIONAL STATEMENT

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit entered on September 24, 1984. The present petition is filed with this Court within ninety days of that date.

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, that:

> nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Sec. 6, Article IV of the Ohio Constitution. App., A30

3. Ohio Supreme Court Rules of Superintendence for Courts of Common Pleas. Rules 3, 4 and 9. App., A16

4. Local Rule 15 of Court of Common Pleas, Cuyahoga County, Ohio. App., A32

STATEMENT OF THE CASE

There is a property right existing in Cuyahoga County, Ohio, protected by federal due process, guaranteeing a ltigant, who uses the county's Common Pleas courts, that his case will be assigned to a duly elected judge chosen by public draw from a sealed deck of elected judges' names by only <u>one</u> man, the Clerk of Courts for said county. If a case is remanded after appeal; only the Clerk (who is the only one legally authorized to possess a deck of cards) can draw a new name.

Petitioner had a case remanded, whereupon the respondent Judge Spellacy, as administrative judge, secretly assigned the case to an elected judge other than the original trial judge, without benefit of an explanatory judgment entry or a prior opportunity to contest the reasons therefor being afforded to the Petitioner. Just prior to pre-trial, Judge Spellacy, again without benefit of an explanatory journalized order or a prior opportunity to contest the reasons therefor, re-assigned the case to a non-elected judge, Judge McMonagle; who was sitting by temporary appointment of the Chief Justice of the Ohio Supreme Court under authority of an amendment to the Ohio constitution. As such, Judge McMonagle was only accountable to the Chief

to remain in his good favor if he desired any further appointments. At no time was the Clerk's sealed deck of judges' names used.

By virtue of existing federal Sixth Circuit Court of Appeals case law, petitioner knew that he was obliged to present his federal due process and equal protection claims to the state courts for determination in the first instance. Accordingly, he challenged the right of Judge McMonagle to sit in his case by raising his federal due process and equal protection claims in written and oral objections, which were overruled by Judge McMonagle, without his passing on the federal constitutional questions raised.

Petitioner then sought prohibition and mandamus in the Ohio Court of Appeals for Cuyahoga County; raised both federal claims, but only the equal protection claim was addressed by the Court of Appeals. A18-A29. He followed with an appeal as of right to the Supreme Court of Ohio; raising both federal claims, but neither his due process or equal protection claim was addressed by the Supreme Court of Ohio. A9-A17.

Having given the state courts the first opportunity to address his two federal claims and their having failed to do so, petitioner then filed a federal civil rights complaint

in federal District Court; presented both his federal constitutional claims, but neither claim was addressed by the District Court. A4-A8. Finally, to the Sixth Circuit Court of Appeals, A1-A3, where they ignored their own cited principle in Flynt v. Leis, 574 F2d 874 (C.A.6, 1978), vacated on other grounds, 439 U.S. 438 (1979), (which case had been cited in every pleading from the outset); which principle held that when a state creates a right that can only be terminated for good cause, it is a protected property interest. As such, a litigant may not be deprived of such property without due process of law.

At great expense of time and money, the petitioner had steered the course set for him by the Sixth Circuit Court of Appeals through four courts on the implied promise that they would honor a principle of law they had established - only to be told upon his arrival, after a 2½ year journey, that no such federal constitutional principle existed. A3.

Petitioner now finds that he has been denied redress and access by four courts, resulting in his having federal due process rights, but without a remedy or a forum wherein those federal due process rights can be enforced.

I. PETITIONER HAD A PROPERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE IN HAVING HIS CASE HEARD BY AN ELECTED JUDGE SELECTED BY PUBLIC LOT OF THE CLERK OF COURTS UNLESS GOOD CAUSE IS SHOWN FOR THE NEED OF TRANSFER TO ANOTHER JUDGE.

Rule 4 of the Ohio Supreme Court Rules of Superintendence for Courts of Common Pleas (A16), Local Rule 15 of Court of Common Pleas of Cuyahoga County, Ohio (A32), and Sec. 1, Rule 8 of the Manual For Operation Of The Common Pleas Court (A33), when read in pari materia, mandate that an elected judge be assigned by the Clerk of Courts, in a new or remanded case, by his public drawing from a sealed deck of elected judges' names, of the judge to be permanently assigned to the case. Once assigned, said judge is solely responsible for the determination of every issue and proceeding therein until termination of the case, unless good cause is shown by a filed judgment entry justifying the transfer of the case to another judge. See Berger v. Berger, 3 Ohio App.3d 125 (Cuyahoga County, 1981).

Therefore, the Petitioner had a property interest protected by the federal Due Process Clause in having his properly assigned judge hear his case. See Logan v. Zimmerman Brush

Co. et al., 455 U.S. 422, 430 (1982) and the cases cited therein.

Rule 3(B) of the same Ohio Supreme Court Rules of Superintendence (A16) provides that the administrative judge has the overall responsibility for "the termination of cases in his division without undue delay." The state Court of Appeals interpreted Rule 3(B) as a grant of discretionary power to the administrative judge to reassign "overage" cases to non-elected retired judges for fast disposition.

However, even assuming that the administrative judge had such power, it could not be used to thwart a litigant's federal due process rights prior to such re-assignment. Although state law can create a protected property interest, it is federal law that determines the due process requirements for terminating such interest, even if state law provides procedures for such termination. See Vitek v. Jones, 445 U.S. 480, 490-491 n.6 (1980); Logan v. Zimmerman Brush Co. et al., supra p. 432, and Santosky v. Kramer, Comm., 455 U.S. 745, 755 (1982).

II. PETITIONER IS ENTITLED TO AN OPPORTUNITY PRIOR TO THE TRANSFER OF HIS CASE TO CONTEST THE REASONS FOR SUCH TRANSFER

The administrative judge does not have absolute discretion to transfer or reassign cases to other judges, cf. Meachum v. Fano, 427 U.S. 215,228 (1976), since there must be a determination of good cause therefor. Even if a case is considered as "overaged," there still must be a determination that a transfer or reassignment is necessary for the prompt disposition thereof. The purpose of due process is to require certain minimum procedures in order "to ensure that the state created right is not arbitrarily abrogated." See Wolff v. McDonnell, 418 U.S. 539,557 (1974).

Not all so-called "overaged" cases are reassigned or transfered by the administrative judge, and there are no standards whatsoever to guide him in his determination as to which cases are to be reassigned or transfered. Because of a lack of such standards, the procedures used by the administrative judge herein permits the deprivation of a protected property interest without due process. See Giaccio v. Pennsylvania, 382 U.S. 399,402 (1966).

This Court has recently held that prior

to any action that will affect an interest in life, liberty or property protected by the Due Process Clause being taken "...notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action to afford them an opportunity to present their objections" must be given. See Mennonite Board of Missions v. Adams, ___ U.S. ___,___, 103 S.Ct. 2076,2712-2713(1983), quoting from Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306,314 (1950).

Permitting the transfer or reassignment of a case without any standards whatsoever will permit the deprivation of a protected property interest at will, and would completely defeat one of the essential purposes of Sup. R. 4, that of preventing "judge shopping" or judicial favoritism. See Berger v. Berger, supra.

In North Carolina v. Pearce, 395 U.S. 711,721 (1968), this Court held that vindictiveness against a defendant for having successfully attacked his first conviction on appeal must play no part in the resentencing of the defendant after his retrial. Such a situation creates a realistic look of vindictiveness which requires the court to state on the record its reasons for a harsher sentence following a retrial. See Blackledge v. Perry

417 U.S. 21,28 (1974). The procedures used by the administrative judge herein creates a situation where a case of an unpopular litigant can be transfered or reassigned to a certain judge for an adverse disposition.

The Respondents cannot distinguish cases to be transfered or reassigned to other judges solely upon the length of time that the cases have been pending. In Logan v. Zimmerman Brush Co. et al., supra, this Court held that it was a denial of due process for the Illinois Fair Employment Practice Commission to dismiss a complainant's cause of action solely for the reason that the Commission failed to convene a fact-finding conference within 120 days. As this Court said on page 436:

> ...it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference ...

In the present case, it is the state system itself that permits the administrative judge to deprive an individual of his property interest solely upon the subjective determination of the state administrative judge that a case is "overaged;" there being no declared definition as to what constitutes "overaged," however.

The decision of the Sixth Circuit Court

of Appeals is in direct conflict with that court's decision in Flynt v. Leis, supra, which dealt with the right of pro hace vice representation. As was stated on page 877:

> In order to insure regularity and impartiality in the administration of justice and secure the similar treatment of similar cases, judges may not upset reasonable expectations in the important affairs of life, such as the employment of counsel without a hearing, the application of a reasonably clear standard, and a statement of reasons. Otherwise, it would be too easy to justify and too difficult to remedy, random arbitrariness and sporadic justice. (Emphasised)

Unlike the case of Leis v. Flynt, 439 U.S. 438 (1979), there exists herein the previously stated state Supreme Court and local court Rules which entitle a litigant to have an elected judge, chosen by public lot of the Clerk, hear and determine his case, unless good cause is shown for deprivation - and there is, therefor, the creation of a property right protected by the Due Process Clause.

Accordingly, the transfer of the Petitioners case herein without any prior notice, and without any standards whatsoever, constituted a deprivation of a protected property interest without due process of law.

III. THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO RULE UPON PETITIONER'S DUE PROCESS CLAIMS AND THE FAILURE TO DO SO CONSTITUTED A DENIAL OF HIS DUE PROCESS RIGHTS AND A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, SO AS TO JUSTIFY THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS PURSUANT TO RULE 17.1(a) OF THIS COURT.

There was an implied promise by the Sixth Circuit Court of Appeals that they would address federal consitutional issues if the litigant first presented those issues to the state courts for adjudication.

In their decisions in Parker v. Turner, 626 F.2d 1 (C.A.6, 1980), and J.P. v. DeSanti 653 F.2d 1080 (C.A.6, 1981), the Sixth Circuit mandated that, prior to the issuance of federal injunctive relief that would cause even a minimal interference with pending state proceedings, it was essential that the state courts be given the first opportunity to correct the federal constitutional errors. The state courts herein ignored the due process issue, as did the federal district court and the Sixth Circuit Court of Appeals.

The Petitioner undertook the prescribed, but exhausting and expensive, route to get to the Sixth Circuit in the expectation that

they would support their position in their previously decided case of Flynt v. Leis, supra. In all courts, Petitioner cited the Flynt case and the due process issue of a protected property interest.

This Court has held that a state may not deprive a person of all existing remedies for the enforcement of a right unless there is, or was afforded to him, some real opportunity to protect it. Brinkerhoff-Faris T&S Co. v. Hill, 281 U.S. 673 (1930). The same obligation is also applicable to federal courts. Therefore, the actions of the Sixth Circuit in ignoring Petitioner's due process claims deprived him of an opportunity for the enforcement of his protected property right (to have his case heard by a duly elected and properly assigned judge) and constituted a denial of due process.

Rule 17.1(a) of this Court's rules says that this Court will consider in its determination of whether or not to grant Certiorari whether a federal court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." The failure of the Sixth Circuit to specifically rule upon the

Petitioner's due process claims is such a substantial departure from the accepted and usual course of judicial proceedings of a federal court of appeals.

The failure of this Court to exercise its supervisory power herein will effectively prevent the Petitioner from having his federal constitutional claims decided. The issues involved herein are too important to be ignored by boththe state and federal courts.

Previously, the Petitioner had filed his Petition For A Writ Of Certiorari with this Court (October Term, 1983, Case No. 83-588) following the Ohio Supreme Court's decision. However, Petitioner's due process claims were not decided by the state courts, and such claims were not properly before this Court at that time. Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241 (1978), on remand 478 Pa 484, 387 A.2d 425, app'l dism'd 443 U.S. 913, which was remanded to determine whether the state court had passed upon the appellant's federal constitutional claims, or whether it had, instead, denied mandamus on an adequate and independent state ground.

In the present case, the Ohio Supreme Court affirmed the denial of the writs of prohibition and mandamus on the basis that the Petitioner had an adequate remedy by way

of a direct appeal after trial. A13. The state court of appeals decided Petitioner's Equal Protection claims, but refused to consider his Due Process claims, and such claims were not necessarily decided by the state court of appeals when it refused to grant the writs of prohibition and mandamus. Cf Street v. New York, 394 U.S. 576,581 (1969).

It follows then, that the prior denial of certiorari should not be controlling herein when the Petitioner has presented his Due Process claims to two state courts and two federal courts without resolution thereof.

IV. AMENDED §6(C) , ARTICLE IV OF THE OHIO CONSTITUTION PERMITS THE CHIEF JUSTICE OF THE OHIO SUPREME COURT TO SET UP AN APPOINTED JUDICIARY OF PRIVATE CITIZENS WHO SERVE AT HIS PLEASURE IN VIOLATION OF THE FEDERAL EQUAL PROTECTION CLAUSE.

§6(A)(3), Art. IV of the Ohio Constitution (A30) states that common pleas judges shall be elected by the electors, while §6(C) Art. IV (A31), states that they cannot hold judicial office if they have attained the age of seventy (70). In contradiction of the age limitation, §6(C), Art. IV was amended and became effective on November 6, 1973, and now granted the Chief Justice of the Ohio Supreme Court authority to appoint retired judges with no time limitation as to the length of their appointment. For example: the following front page items from Cleveland's only newspaper, The Plain Dealer;

> Judge illegal for years; cases in doubt. September 7, 1983. Theodore M. Williams served illegally as a visiting judge in Cleveland Municipal Court for more than seven years because he had not been reappointed, Ohio Supreme Court officials have determined.....His daily pay was the same as municipal judges who earn $50,750 a year.
>
> Retired judge: Chief Justice cut me out. September 9, 1983. Retired Shaker Heights Municipal Judge Manuel M. Rocker said he has been unable to serve as a

> visiting judge in Greater Cleveland courts this year because he offended Ohio Supreme Court Chief Justice Frank D Celebrezze by writing an article on judicial merit selection .....
>
> (As of this writing Judge Rocker has a pending civil rights action against the Chief Justice claiming violation of his First Amendment rights)

By virtue of Ohio Rev. Code Sec. 141.16, (A31), the Chief Justice has been able to set up a state wide network of retired private citizens as judges and have the counties wherein they sit pay their compensation without the prior approval of the county commissioners. State, ex rel. Winn v. Galvin, 39 Ohio St.2d 58 (1974). They are only accountable to him and must remain in his good favor to retain their patronage position.

Accordingly, the appointed judiciary at both the county and municipal level silently and progressively arrived, as Sandburg's Fog, on little cat feet, unscrutinzed by the Ohio electorate. That the concept of an appointed judiciary was repugnant to the Ohio Supreme Court previously, was set forth in Hilton v. Bell, 108 Ohio St. 233,238 (1923):

> Not only does the express language of the judicial article of the Constitution, but its entire spirit, breathe antagonism to an appointed judiciary.

The opinion then continued that only the

state Governor has power to make appointments and then only to fill a vacancy until the next general election. Also, see Cherrington v. Hutsinpiller, 112 Ohio St. 468,475 (1925), and State, ex rel. Graves v. Brown, 18 Ohio St.2d 61 (1969).

By virtue of there being two judicial systems in Ohio, the elected and appointed, the result is similarly situated litigants being treated in a dissimilar manner. As in Logan v. Zimmerman Brush Co. et al., supra, this is the very essence of arbitrary state action.

Imposing special disabilities upon certain individuals suggests the kind of "class or caste" treatment the Fourteenth Amendment was designed to abolish. Pyler v. Doe, 457 U.S. 202,216 n.14 (1982). "The Equal Protection Clause imposes a requirement of some rationality in the nature of the class that is singled out." James v. Strange, 407 U.S. 128,140 (1972).

Practices allowing two judicial systems infringes on a litigant's right in a suffrage state to elect and hold accountable persons who perform duties as judges or other elected offices. Hortonville District v. Hortonville Education Ass., 426 U.S. 482,496 (1976), and Hilton v. Bell, supra, p.238.

Petitioner's right to vote is unconstitutionally diluted when he is deprived of his right to have his case heard by a judge elected by the electorate. It is not that he is being denied the right to vote, but the benefit of the consequences of his right to vote. Baker v. Carr, 369 U.S. 186,207-208 (1962); Williams v. Rhodes, 393 U.S. 23,30-31 (1968); Reynolds v. Sims, 377 U.S. 533,554-555 (1964) and Hadley v. Junior College District, 397 U.S. 50,54 (1970).

The procedure offered by the Supreme Court of Ohio of accepting the wrong, forcing the litigant through a time consuming and expensive trial, and then a costly appeal in hope of returning to the place of beginning for the same treatment of "Musicial Benches," is calculated to discourage and exhaust any litigant, and constitutues a substantial burden on his constitutional right of access to the courts for redress of grievances.

The flaw in the assumption that a violation of the Equal Protection Clause may be cured "after the fact" by appeal is contrary to the very basic constitutional concept that the purpose of equal protection is to assure fair and equal treatment before the wrong is committed, not afterwards. This Court has never "embraced the general proposition that

a wrong may be done if it can be undone." Stanley v. Illinois, 405 U.S. 645,647 (1972).

In a recent, well publicized, but as yet unreported federal criminal case, U.S. v. August and Bozoff, No. 82-80156 (E.D. Mich., S.D., June 28, 1983), a prominent bankruptcy attorney and a federal intake clerk were convicted of violating the federal obstruction of justice statute, 18 U.S.C. §1503, by manipulating the blind draw assignment procedure.

Ohio, too, has similar criminal statutes:

> Ohio Rev. Code Sec. 2921.44
>
> Dereliction of Duty
>
> (E) No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to his office, or recklessly do an act expressly forbidden by law with respect to his office.
>
> Ohio Rev. Code Sec. 2921.45
>
> Interfering with civil rights
>
> (A) No public servant, under color of his office, employment, or authority, shall knowingly deprive, or conspire or attempt to deprive any person of a constitutional or statutory right.

And here lies the interplay between the two constitutional infringements: For if there was no appointed judiciary, there would be no need for the administrative judge to provide them with work at public expense by transferring or reassigning cases without any standards, justifiable reasons, or a prior

opportunity being afforded an affected litigant to contest the change in judges.

Can an act, which is morally, ethically and criminally wrong when performed on a federal level by an attorney and a federal employee, be purged of its questionable legality simply because it is performed on a state level by an administrative judge of a multi-judge state court in furtherance, directly or indirectly, of a federally unconstitutional appointed judiciary in a suffrage state?

The 1973 constitutional amendment was originally presented to the Ohio electorate on the basis that when both litigants agreed, a retired judge would be made available on a per diem basis to hear their case. As administered, however, on a state and county level, the complained of procedures have resulted in both due process and equal protection violations occurring. At A34 is a list of retired judges reportedly assigned to the Court of Common Pleas. Judge McGettrick's name should be excluded, however, as he is not retired, but is presently under indictment for bribery.

Inasmuch as the voters of Cuyahoga County are paying the salaries of the eight retired judges listed, it would seem only fair that they be able to elect the judges they pay.

CONCLUSION

Petitioner respectfully urges that this Court grant his petition and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment that court entered against him, and to remand this matter to that court for further consideration of the constitutional questions that have been presented herein.

Respectfully submitted,

SANFORD J. BERGER, Counsel of Record
ROBERT M. FERTEL
BERGER AND FERTEL

1836 Euclid Ave., Room 305
Cleveland, Ohio 44115
Phone: (216) 781-5950

Attorneys for Petitioner

Petitioner believes that 28 U.S.C. §2403(b) may be applicable, and has, accordingly, served three (3) copies of this Petition upon the Attorney General of the State of Ohio by regular mail. A separate proof of service is filed herewith.

APPENDIX

DECISION OF THE UNITED STATES COURT OF OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed Sept. 24, 1984)

No. 84-3095

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SANFORD J. BERGER

Plaintiff-Appellant

- vs -

HON. LEO M. SPELLACY
HON. GEORGE J. McMONAGLE

Defendants-Appellees

ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division

---

Before: MERRITT, KENNEDY, AND WELLFORD, Circuit Judges

This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. In addition, a motion to vacate and remand made by the appellant has been referred to this panel pursuant to an Order of the Court entered February 29, 1984. After examination of the record, the briefs and the motion to vacate and remand, the panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of

Appellate Procedure.

This matter is before the Court upon an appeal of the district court's order which dismissed the appellant's 42 U.S.C. §1983 claim as violative of the doctrine of res judicata. The basis of this §1983 action involves the alleged deprivation of appellant's Federal Constitutional rights caused by the assignment of Judge McMonagle, a retired Ohio Court of Common Pleas Judge, to hear the appellant's Ohio civil case-Berger v Palay, Case No. 78-990807. Appellant's civil case was designated as an overaged case by Judge Spellacy, Administrative Judge of the Cuyahoga County Common Pleas Court. The case was re-assigned for expedited disposition. The appellant upon assignment of his case to Judge McMonagle, petitioned the Ohio Court of Appeals for a writ of prohibition to prevent Judge McMonagle from hearing the case and requested a writ of mandamus ordering assignment of a duly elected judge to his case. The Court of Appeals denied relief and the Ohio Supreme Court affirmed in Berger v. McMonagle, 6 Ohio St.3rd 28 (1983). Subsequently, the appellant filed a writ of certiorari to the United States Supreme Court and that petition was denied. 52 USLW 3451 (1983).

The appellant is alleging that the assignment of Judge McMonagle to his case violates the due process and equal protection clause of the Fourteenth Amendment. After review of the record and appellant's claims, this Court finds that it was proper to dismiss the appellant's action for reasons other than those stated in the district court judgment. If the judgment of the district court is correct on any ground it is entitled to affirmance. City of Cleveland v. Cleveland Elec. Ill. Co., 570 F.2d 123, 128 (6th Cir. 1978). Although the application of the doctrine of res judicata by the district court was arguably improper since the federal constitutional issues were not addressed in the Ohio state courts, it is clear that the appellant has not stated a claim cognizable under the federal constitution. There is no federal constitutional or statutory principle that requires that a state civil trial be heard by an "elected" judge, as the appellant argues.

Accordingly, it is ORDERED that appellant's motion to vacate and remand is denied and that the district court judgment is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A4

Case No. C 83-3322
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Decided and Filed January 20, 1984)

SANFORD J. BERGER
Plaintiff
v.
HON. LEO M. SPELLACY, et al.
Defendants

LAMBROS, DISTRICT JUDGE

This is a civil rights action brought by plaintiff Sanford J. Berger pursuant to 42 U.S.C. §1983. Named as defendants are Judge Leo M. Spellacy, Administrative Judge of the Cuyahoga Court of Common Pleas, and Judge George J. McMonagle, a retired Common Pleas Judge sitting by temporary assignment of the Chief Justice of the Ohio Supreme Court.

Plaintiff Sanford J. Berger is also the plaintiff in a civil action currently pending in the Cuyahoga County Court of Common Pleas. Berger v. Palay, Case No. 78-990, 807. The case was originally assigned to Judge Harry A Hanna, who granted a motion for summary judgment in favor of the defendants. Plaintiff appealed that decision to the Ohio Court of Appeals, which reversed the judgment of the trial court and remanded the action for further proceedings.

On remand to the Court of Common Pleas, Judge Spellacy as Administrative Judge,

reassigned the case by lot to Judge James J. Sweeney. Subsequently, Judge Spellacy conducted a review of the caseload of the Judges in the Court of Common Pleas for purposes of adjusting each judge's docket containing overaged cases. Plaintiff's case was among one of many civil actions selected for transfer. Ultimately, the case was assigned to Judge George J. McMonagle, a retired Judge sitting by assignment pursuant to Article IV Section 6(C) of the Ohio Constitution.

Plaintiff then initiated an action against the defendants in this case in the Ohio Court of Appeals seeking a writ of prohibition to prevent Judge McMonagle from hearing the case and a writ of mandamus ordering Judge Spellacy to assign the proceeding by lot to a duly elected judge of the Court of Common Pleas. The Court of Appeals entered judgment against the plaintiff, and plaintiff appealed this decision to the Ohio Supreme Court. The Ohio Supreme Court affirmed the judgment of the Court of Appeals stating that the appointment of a retired judge to temporary assignment is lawful pursuant to Article IV, Section 6(C) of the Ohio Constitution. Berger v. McMonagle, 6 Ohio St.3d 28 (1983).

Plaintiff thereafter filed a petition

for certiorari to the United States Supreme Court seeking review of the Ohio Supreme Court's decision. This petition was denied by the United States Supreme Court. 52 USLW 3451 (1983).

In the present action, plaintiff alleges that the assignment of his Common Pleas case to a retired, non-elected judge violates his right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Defendants have filed a motion to dismiss the present action asserting that plaintiff has failed to state a claim upon which relief can be granted and that plaintiff's claim is barred by the doctrine of res judicata.

"Res judicata is a judicially created doctrine under which a valid final judgment is binding on the parties as to all matters of law that were or should have been adjudicated in a proceeding." United States v. LaFatch, 565 F.2d 81, 83 (6th Cir. 1977). The purpose of the doctrine is to avoid repetitive suits over the same subject matter and to bring litigation to a final resolution. In the present action, plaintiff challenges the lawfullness of the practice of the Cuyahoga County Court of Common Pleas to assign retired judges to sit in trial on civil

actions. This is precisely the issue that plaintiff litigated in the Ohio Supreme Court. Additionally, the United States Supreme Court denied plaintiff's petition for review of the Ohio Supreme Court decision. Consequently, plaintiff is precluded from raising the same issue in this Court under the doctrine of res judicata.

The fact that plaintiff has initiated the present case as a civil rights action pursuant to 42 U.S.C. §1983 is not sufficient to bar application of the doctrine of res judicata. "[T]his Circuit has made it plain that the filing of an action under §1983 cannot serve as a basis for relitigating questions previously decided in State Courts." Tonti v. Petropoulous, 656 F.2d 212, 216 (6th Cir. 1981). "The Civil Rights Act was not designed to be used as a substitute for the right of appeal, or to collaterally attack a final judgment of the highest court of a state and relitigate the issues which it decided." Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209, 1211 (6th Cir. 1970). The issue raised in the present case is identical to that raised in the State courts. The final judgment of the Ohio Supreme Court is conclusive, and plaintiff is prohibited from relitigating the issue decided in that

proceeding.

Defendant's motion to dismiss is granted.

This action is terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
U.S. District Judge

DATED: 1/19/84

ORDER OF THE SUPREME COURT OF OHIO
(Dated July 13, 1983.)
No. 82-34
THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

THE STATE, EX REL. BERGER,
Appellant,
vs.
McMONAGLE, JUDGE, ET AL.,
Appellees.

Appeal From The Court Of Appeals
For Cuyahoga County

Appellant, Sanford J. Berger, is the plaintiff in a civil action currently pending in the Court of Common Pleas of Cuyahoga County. The action was originally assigned to Judge Harry A. Hanna, who granted a motion for summary judgment in favor of the defendants. On appeal, the court of appeals reversed the judgment of the trial court and remanded the cause for further proceedings.

On remand, Judge Leo M. Spellacy, Administrative Judge of the Court of Common Pleas and an appellee herein, reassigned the case by lot. The assignment was accomplished by selecting a card from a sealed pack in

which each card bears the name of one judge of the court of common pleas. In accordance with this procedure, the case was assigned to Judge James J. Sweeney.

Subsequently, Judge Spellacy, in his capacity as the administrative judge, conducted a review of the caseloads of the judges in the court of common pleas for purposes of adjusting each judge's docket containing overaged cases. The underlying civil action was among one of many civil actions selected for transfer. Accordingly, Judge Spellacy informed Judge Sweeney by letter dated February 18, 1982, that the civil action was eligible for transfer. On February 22, 1982, Judge Sweeney entered an order transferring the case to Judge Spellacy.

Ultimately, the case was assigned to Judge George J. McMonagle, also an appellee, for trial, Judge McMonagle is a retired judge sitting by assignment pursuant to Section 6(C), Article IV of the Ohio Constitution. Appellant filed an objection to the assignment and verbally requested that Judge McMonagle disqualify himself on the basis that he and counsel for the defense were related to one another. The objection was overruled on April 26, 1982.

Appellant then filed the instant action

in the court of appeals seeking a writ of prohibition to prevent Judge McMonagle from hearing the case and a writ of mandamus ordering Judge Spellacy to assign the proceeding by lot to a duly elected judge of the court of common pleas. The court of appeals granted appellees' motion for summary judgment and dismissed the complaint concluding that appellant failed to satisfy the requisite elements necessary for the issuance of either writ.

(29) The cause is now before this court on an appeal as of right.

Mr. Sanford J. Berger, pro se, and Mr. Robert M. Fertel, for appellant.

Mr. John T. Corrigan, prosecuting attorney, Mr. Thomas P. Gill and Mr. Patrick Carroll, for appellees.

Per Curiam. This court has consistently held that in order for a writ of mandamus to issue the relator must demonstrate "(1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law." State, ex rel. Harris, v. Rhodes (1978), 54 Ohio St. 2d 41, 42 (8 O.O. 3d 36); State, ex rel. Heller, v. Miller (1980), 61 Ohio St. 2d 6 (15 O.O. 3d 3), paragraph one of the

syllabus; State, ex rel. Westchester, v. Bacon (1980), 61 Ohio St. 2d 42 (15 O.O. 3d 53), paragraph one of the syllabus.

In order for a writ of prohibition to lie, the following three requirements must be satisfied: "(1) the court or officer against whom it is sought is about to exercise judicial or quasi-judicial power; (2) the exercise of such power is unauthorized by law; and (3) it will result in injury for which no other adequate remedy exists." Ohio Bell v. Ferguson (1980), 61 Ohio St. 2d 74, 76 (15 O.O. 3d 117); State ex rel. Rose Hill Burial Park, v. Moser (1982), 1 Ohio St. 3d 13, 14; State, ex rel. Dow Chemical Co., v. Court (1982), 2 Ohio St. 3d 119, 120.

In support of the request for a writ of mandamus, appellant argues that pursuant to C.P. Sup. R. 4,[1] Judge Spellacy was required to have the remanded proceeding assigned by lot to a duly elected judge of the court of common pleas. Assuming, arguendo, that the proceeding was improperly transferred from Judge Sweeney, in spite of C.P. Sup. R. 3(B)[2] and 9,[3] which (30) enable the administrative judge to implement procedures to facilitate the prompt disposition of cases, appellant has failed to demonstrate the absence of a plain and adequate

remedy in the ordinary course of the law.

It is firmly established that the writ of mandamus will not issue "*** where the relator has or had available a clear, plain and adequate remedy in the ordinary course of the law." State, ex rel. Sibarco Corp., v. City of Berea (1966), 7 Ohio St. 2d 85, 88 (36 O.O. 2d 75); State, ex rel. Leis, v. Outcalt (1980), 62 Ohio St. 2d 331, 333 (16 O.O. 3d 392); State, ex rel. Bargar, v. Ross (1978), 53 Ohio St. 2d 18, 19 (7 O.O. 3d 62); Lippert v. Engle (1977), 52 Ohio St. 2d 67 (6 O.O. 3d 234); State, ex rel. Pressley, v. Indus. Comm. (1967), 11 Ohio St. 2d 141 (40 O.O. 2d 141). Moreover, it is axiomatic that a "*** discretionary right of appeal***(constitutes) a sufficiently plain and adequate remedy in the ordinary course of the law." State ex rel. Cleveland v. Calandra (1980), 62 Ohio St. 2d 121, 122 (16 O.O. 3d 143).

Since appellant possesses an adequate remedy at law by way of appeal to the court of appeals in which he may contest the issue of an improper assignment, the court below properly dismissed the complaint for a writ of mandamus.

Likewise, the availability of an appeal is fatal to appellant's request for a writ of prohibition. This court has repeatedly

held that "(p)rohibition is not concerned with the exercise of discretion by an inferior tribunal having jurisdiction of the subject matter and the parties in a cause before it. That issue is for the determination of a reviewing court," even if errors or defects exist in the proceedings. State, ex rel. Staton, v. Court (1965), 5 Ohio St. 2d 17, 22 (34 O.O. 2d 10); State, ex rel. Gross, v. Marshall (1974), 39 Ohio St. 2d 92, 94 (68 O.O. 2d 54); State, ex rel. Dow Chemical Co., v. Court, supra, at 121. In addition, "prohibition cannot be used as a substitute for appeal," which is precisely the fashion in which appellant seeks to employ the writ. State, ex rel. Crebs, v. Crebs, v. Court of Common Pleas (1974), 38 Ohio St. 2d 51, 52 (67 O.O. 2d 61).

Appellant also contests the lawfulness of the appointment of Judge McMonagle, a retired judge, contending that Section 6(A)(3), Article IV of the Ohio Constitution requires a trial judge to have been elected and currently serving his term. That section provides in part:

"The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located***."

We reject appellant's contention and conclude that the aforementioned constitutional section must be read *in pari materia* with Section 6 (C), Article IV of the Ohio Constitution which provides, in pertinent part:

"*** Any voluntarily retired judge, or any judge who is retired under (31) this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge ***."

The record conclusively demonstrates that Judge McMonagle's assignment was made in accordance with Section 6(C), Article IV of the Ohio Constitution. Moreover, that portion of Section 6(A)(3), Article IV, pertains only to the election of judges and not to the temporary assignment of a judge having been duly elected and subsequently retired under Section 6(C), Article IV of the Constitution. Accord *State v. Partanen* (1940), 67 Ohio App. 248 (21 O.O. 231).

For all of the foregoing reasons, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER, HOLMES AND C. BROWN, J.J., concur.

J.P. CELEBREZZE, J., not participating.

[1]C.P. Sup. R. 4 provides:

"For the purpose of these rules, the individual assignment system is that system whereby, upon the filing in, or transfer to, a division of the court of a civil case, or upon arraignment in a criminal case, a case is immediately assigned by lot to a judge thereof, who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination. Under such system, all preliminary matters, including requests for continuances, must be submitted for disposition to the judge to whom the case has been assigned, or if he is unavailable to the administrative judge.

"Each multi-judge general division of each court of common pleas shall adopt the individual assignment system as defined herein for the assignment of all cases to judges of the division for disposition."

[2]C.P. Sup. R. 3(B) provides, in pertinent part:

"The administrative judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. He shall cause cases to be assigned to the judges within the division and shall require such reports from each judge concerning the status of assigned cases as he may require to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay."

[3]C.P. Sup. R. 9 provides:

"Nothing in these superintendence rules prevents any local rule of practice which seeks to promote the use of any device or

procedure which would tend to facilitate the earlier disposition of cases, including the making of local rules of court restricting the volume of cases attorneys may undertake."

JOURNAL ENTRY AND OPINION OF THE COURT
OF APPEALS FOR CUYAHOGA COUNTY, OHIO

No. 45341
(Dated July 1, 1982)

COURT OF APPEALS OF OHIO
Eighth District
County of Cuyahoga

THE STATE, EX REL. BERGER,
Relator,
vs.
McMONAGLE, JUDGE, ET AL.,
Respondents.

JOURNAL ENTRY AND OPINION

MARKUS, J.:

Relator is the plaintiff in a Common Pleas Court case which was remanded to that court following an appeal to this court. Upon remand, the case was not assigned to the original judge. Instead, the administrative judge assigned it to another regularly serving judge of that court. One month later, the administrative judge caused the case to be transferred to his own docket and assigned it to a retired judge, in order to expedite its consideration.

Relator's objections to that ultimate

assignment were overruled by the assigned retired judge. Relator then filed this original action, seeking a writ of prohibition to prevent the respondent retired judge from hearing the case and a writ of mandamus ordering the respondent administrative judge to assign the case to a regularly serving judge by lot.

We grant respondents' motion for summary judgment because relator has an adequate remedy at law and because the reassignments were not improper or unlawful.

Relator claims that the administrative judge improperly reassigned the case to a second judge because the assignment entry failed to show the second judge was selected by lot and failed to state reasons for the reassignment. Relator relies principally on this court's decision in Berger v. Berger (Ct. App. Cuy. Cty., Oct. 22, 1981), No. 43365, but we find no support in that case for his argument.

In Berger v. Berger, a divorce case (filed by the relator in the present case) had been repeatedly reassigned to new judges without explanation while it was pending in the domestic relations division of the Common Pleas Court. We held that C.P. Sup. R. 4[1]

---

[1]See C.P. Sup. R. 4, supra, A8.

required that a reassignment "must be accompanied by a journal entry executed by the administrative judge which states a justifiable reason for transferring responsibility for the case to another judge." Berger, supra at 10-11.

However, C.P. Sup. R. 4 does not specify the method used to select a judge when a case is remanded from an appellate court. Section 1, Rule 9 of the Manual for Operation of the /Cuyahoga County/ Common Pleas Court states: "Cases remanded by the Court of Appeals will be reassigned in the same manner as new filings." The procedure for assigning new cases is set forth in Local Rule 15 (A):

> "All civil cases shall be assigned to a judge by drawing a card from a sealed deck handled by the Clerk under the supervision of the Court Administrator. The deck shall be constructed so as to insure that the identity of the next judge name in the deck is unknown until the card is drawn."

The policy of reassigning a remanded case to a new judge is justifiable because the original judge may have some predisposition about the case or the parties. The requirement that a judgment entry should explain the reason for reassignment is satisfied by the appellate court's order remanding the case to the trial court.

Berger v. Berger, supra, does not require that a judgment entry show the method used to select a judge. Absent a contrary showing, selection by lot is presumed in conformity with the Superintendence Rule and the corresponding local rule. Further, in this case, the administrative judge's affidavit attached to the summary judgment motion affirmatively shows that the second judge was selected by lot from a sealed deck in compliance with Local Rule 15(A). Thus, the reassignment of the case to the second judge was entirely proper.

Relator further contends his case was improperly transferred from the second judge to the administrative judge's docket for expedited hearing by a retired judge. We disagree.

The preface to the rules of superintendence states:

> "Delay in both criminal and civil cases in the trial courts of Ohio is always a serious problem in the administration of justice. It is to be remembered that the courts are created not for the convenience or benefit of the judges and lawyers, but to serve the litigants and the interests of the public at large. When cases are unnecessarily delayed, the confidence of all people in the judicial system suffers. The confidence of the people in the ability of our system of government to achieve liberty and justice under

> law for all is the foundation upon which the American system of government is built.
>
> "The following rules are designed (1) to expedite the disposition of both criminal and civil cases in the trial courts of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; and (2) to serve that public interest which mandates the prompt disposition of all cases before the courts."

The powers of the administrative judge are set forth in C.P. Sup. R. 3(B):

> "The administrative judge shall be the presiding officer of his division and shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. He shall cause cases to be assigned to the judges within the division and shall require such reports from each judge concerning the status of assigned cases as he may require to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay." (Emphasis added)

Thus, we find a strong policy in favor of the prompt disposition of cases. The policy is reiterated in C.P. Sup. R. 9:

> "Nothing in these superintendence rules prevents any local rule of practice which seeks to promote the use of any device or procedure

> which would tend to facilitate the earlier disposition of cases, including the making of local rules of court restricting the volume of cases attorneys may undertake."

Section 1, Item 9 of the Manual for the Manual for Operation of the /Cuyahoga County/ Common Pleas Court provides:

> "The Administrative Judge will undertake a periodic review of each Judge's Total caseload and provide for adjustments if and when necessary."

In his affidavit, the administrative judge stated:

> "5. That pursuant to my duties as Administrative Judge, I selected at random by computer several overage cases to be eligible for transfer from the assigned judge.
>
> "6. That Berger v. Palay, supra, was one of the cases selected at random for transfer and reassignment.
>
> "7. That upon selection of this case, I wrote a letter to Judge Sweeney on February 18, 1982, informing him of the eligibility of this civil action for transfer.
>
> "8. That Judge Sweeney transferred this case to my docket by journal entry dated February 22, 1982.
>
> "9. That upon transfer of this civil action to my docket for control purposes, I assigned the case to Judge George J. McMonagle for trial.

> "10. That Judge McMonagle is a retired judge sitting by assignment of the Supreme Court of Ohio.
>
> "11. That as a retired judge, Judge McMonagle does not have his own docket of cases."

Reassigning a case for the purpose of expediting the litigation is proper and commendable under the spirit of the rules of superintendence. Although it may have been better form for the journal entry to show that the case was transferred in order to avoid further delay in the disposition of the case, the affidavit of the administrative judge serves as sufficient explanation in this case.

Relator argues that his case should not have been assigned to a retired judge because Article IV, Sec. 6(A)(3) provides for the election of all judges. That section states:

> "The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are locared, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located."

However, that section must be read in conjunction with Article IV, Section 6(C), which states in part:

> "Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled."

The constitutional provision that requires judges to be elected by electors in the counties where their courts are located does not apply to the temporary substitution or assignment of a retired judge. See State v. Partanen (1940), 67 Ohio App. 248, 251. See also State, ex rel. Winn, v. Galvin (1974), 39 Ohio St. 2d 58.

Relator contends he was denied his constitutional right to equal protection because his case was not assigned to the retired judge by lot. This argument lacks merit. The State has a legitimate interest in providing for the disposition of cases without delay. It is rational to assist this process by transferring older cases from judges with overcrowded dockets to available retired judges who can more promptly dispose of such cases.

Because retired judges are not regularly assigned cases and do not have their own dockets, their names cannot be included in the randomly ordered sealed deck from which regularly serving judges are selected. Therefore, it is rational to transfer the cases to the docket of the administrative judge and then assign them for hearing by the retired judge. Accordingly, relator's right to equal protection was not violated.

For the foregoing reasons, the procedures used to reassign relator's case were proper and lawful, and did not deprive the retired judge of jurisdiction. However, even if Relator's claim had substantive merit, we could not grant the requested relief.

This court may issue a writ of prohibition when the following conditions are shown to exist: "(1) the court or officer against whom it is sought must be about to exercise judicial or quasi-judicial power; (2) the exercise of such power must be unauthorized by law; and (3) it must appear that the refusal of the writ would result in injury for which there is no other adequate remedy." State, ex rel. Wall, v. Grossman (1980), 61 Ohio St. 2d 4, quoting State, ex rel. Lechmann, v. Cmich (1970), 23 Ohio St. 2d 11.

Relator has shown that the retired judge is about to exercise judicial power, but he has failed to show the existence of the remaining two prerequisites. Our examination of the situation discloses no circumstance which would deprive the retired judge of jurisdiction to hear relator's case, even if the assignment was improper. Thus, if relator prevails in the trial of the underlying case, his adversary could not assert the court's action was void for lack of jurisdiction. Moreover, if there had been an improper assignment, relator could have raised the issue on appeal to this court, just as he did in Berger v. Berger, supra.

A writ of mandamus will issue only upon a showing that relator has a clear legal right to the relief prayed for, respondent is under a clear legal duty to perform the requested act, and relator has no plain and adequate remedy at law. State, ex rel. Heller, v. Miller (1980), 61 Ohio St. 2d 6; State, ex rel. Akron Fire Fighters v. Akron (1978), 54 Ohio St. 2d 448.

Relator has not shown a clear legal right to have his case assigned by lot, rather than to an available retired judge. Nor has he shown that the administrative judge has a clear legal duty to do so. Furthermore, relator has an adequate remedy

at law, since he could raise the issue of an improper assignment in an appeal to this court.[2]

In Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66, the court held:

> "The appositeness of rendering a summary judgment hinges upon the tripartite demonstration: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor."

---

[2]Relator does not assert any special incapacity of the assigned retired judge to hear this particular case. Any such claim would have to be raised by an affidavit of prejudice pursuant to R.C. 2701.03.

Respondents have satisfied all three requirements. Therefore, respondents' motion for summary judgment is granted and this case is dismissed at relator's costs.

CELEBREZZE, J. and

NAHRA, J. CONCUR.

RICHARD M. MARKUS
Presiding Judge

For Relator: Sanford J. Berger,
Robert M. Fertel

For Respondents: John T. Corrigan,
Thomas P. Gill
Patrick Carroll

UNITED STATES CONSTITUTION

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE IV

Section 6, in pertinent part:

(A)(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which

his court is located.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

OHIO REVISED CODE
Section 141.16

Compensation of assigned retired judges

Any voluntarily retired judge, or any judge who is retired under Section 6 of Article IV, Ohio Constitution, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court, to active duty as a judge and while so serving shall receive the established compensation for such office, computed on a per

diem basis, in addition to any retirement benefits to which he may be entitled.

Upon submission of a voucher signed by the administrative director of the Ohio courts, the auditor of state shall issue a warrant upon the treasurer of state for the entire amount payable to the assigned judge. Annually, on the first day of August, the auditor of state shall issue a billing to the county treasurer of any county to which such a judge is assigned for reimbursement of the county's portion of the compensation previously paid by the state for the twelve-month period preceding the last day of June. The County's portion of compensation shall be that part of each per diem paid by the state which is proportional to the county's share of the total compensation of a resident judge of such court. The county treasurer shall forward the payment within thirty days.

LOCAL RULE 15
COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

(A) All civil cases shall be assigned to a judge by drawing a card from a sealed deck handled by the Clerk under the supervision of the Court Administrator. The deck shall be constructed so as to insure that the identity of the next judge name in the

deck is unknown until the card is drawn.

(B) It shall be the duty of the individual judge to handle all court activity, including motions and emergency matters, status hearings, pretrials, trials etc. associated with the cases assigned to him.

(C) The scheduling of civil cases for status hearings and pretrials will he handled by the Central Scheduling Office (CSO) in accordance with the Manual of Operations maintained by that office.

(D) The scheduling of a case for trial will be accomplished by the judge to whom the case is assigned. A trial date will be set as the judge decides or at the conclusion of the pretrial when no settlement has been effected.

MANUAL FOR OPERATION OF THE
COMMON PLEAS COURT
Section 1, Rule 8

8. Cases remanded by the Court of Appeals will be reassigned in the same manner as new filings.

THE DAILY LEGAL NEWS AND CLEVELAND RECORDER

SATURDAY, DECEMBER 1, 1984

Judge James J. McGettrick

Judge Bernard Friedman

Judge George J. McMonagle

041498—Marris vs City of Brook Park. Judgment entry.

Judge Harry Jaffe

Judge Roy F. McMahon

Judge John J. Carney

Judge Warren Bettis

Judge Eugene J. Sawicki

Judge William F. Brown

073214—Central Trust vs Bartholomen. Judgment entry.

067704—Workwear vs D. O. Summers. Settled and dismissed with prejudice at pltffs. costs.

080829—Harrington vs Ryan. Judgment entry.

065908—Gill Co. vs Bell. Decree for pltff.

059825—Ohio Commercial vs Voyzey. Judgment entry.

069623—Fidelity Bond & Mortgage Co. vs Williams. Judgment for pltff.